UNITED NATIONS

GENERAL

ASSEMBLY

Distr.
LIMITED

A/CN.9/376
5 May 1993

ORIGINAL: ENGLISH
SPANISH
ARABIC

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-sixth session
Vienna, 5 - 23 July 1993

MODEL LAW ON PROCUREMENT

Compilation of comments by Governments

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INTRODUCTION

1. The Commission, at its twenty-fifth session in 1992, requested the Working Group on the New International Economic Order to present to it at its twenty-sixth session in 1993 a draft of the Model Law on Procurement.[1/] The Working Group, at its fifteenth session (New York, 22 June to 2 July 1992) adopted a text of the draft Model Law and presented it to the Commission for its consideration (A/CN.9/371, para. 253).

2. The text of the draft Model Law as adopted by the Working Group was sent to all Governments and to interested international organizations for comment. The comments received as of 5 May 1993 from 11 Governments are reproduced below.

1/ Report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17), para. 153.

COMPILATION OF COMMENTS

ARGENTINA

[Original: Spanish]

Article 1. Scope of application

"Adjudicación" or "adjudicación de contratos" (award or award of contracts) is used as a synonym for the selection of the contracting party, although it has meanings that vary. "Adjudicación" is merely one step in the "tendering" process which, in turn, is just one of the systems thought suitable for the selection of the contracting party.

Article 2. Definitions

For technical drafting reasons, it would be better to put the definitions in the first article of the draft law, particularly since article 1, concerning the scope of application, uses terms that have not yet been defined.

The terms defined prompt the following comments:

(a) Procurement (contratación pública). First of all, it should be pointed out that no reference is made to the purpose of the contract, which is the feature normally used to differentiate public or administrative contracts.

The term "adquisición", used in the definition of "procurement", is normally used in Spanish to convey "obtaining by purchase" and not, for example, by rental. We therefore suggest the use of "obtención" ("obtaining") in place of "adquisición".

We do not see why "services" should be restricted to those "incidental to the supply of the goods or to the construction". It seems preferable to have a broader definition, including all services, without restriction, as well as all other contributions to satisfy needs of a general nature.

Finally, it should be pointed out that the restriction in question limits the scope of the standard envisaged for administrative contracts - basically contracts for public construction and for rental of objects and construction - omitting others, such as the licensing of public service or rental of services.

In view of the above, we suggest the following definition: "'procurement' (contratación pública) means the obtaining by any legal means, including by purchase, licensing, rental, lease or hire-purchase, of goods, construction and services designed to promote collective interests or to satisfy public needs."

(b) Procuring entity. The Spanish term refers to decentralized entities with legal personality. It would be better to replace it with the broader expression "órgano adjudicador", using "organ" in its legally-accepted form of "set of competences". To remove any doubt the definitions could also include a definition of "órgano adjudicador". We suggest the following: "organ having competence to sign public contracts".

(c) Goods. We think it inadvisable to limit the term to physical objects, since non-physical objects may also be the subject of public contracts. A contract may also relate to obtaining energy other than electricity, the only form covered by the definition. We therefore suggest the following amended definition: "'goods' includes any physical object or non-physical object (including energy), that may be given a pecuniary value".

(d) Construction. The definition in the draft seems to restrict the meaning of the concept to construction, although there are many other activities that may be covered by administrative contracts for public works, for the concession of public works or for the rental of the work. We propose a broader definition: "'Construction' means work with a certain and specific purpose, whose execution has been stipulated in a procurement contract".

(e) Supplier or contractor. The definition refers exclusively to one of the stages in administrative contracts (award). It would be preferable to define a supplier or contractor as "the natural person or legal entity who, in accordance with current legal provisions, takes part in a selection process connected with the execution of a procurement contract or signs a procurement contract with the procuring organ".

(f) Procurement contract. Once again it should be mentioned that the process is one of selection of the contracting party and not one of award (adjudicación). Award is only one step in the procedure.

(g) Tender security. Here and elsewhere in the draft, "licitación" ("tendering") is used synonymously with "oferta" ("offer"). It would be preferable to replace "licitación" with "oferta", particularly if we consider that "licitación" refers to one of the existing procedures for the selection of the joint contracting party with the State.

Article 6. Qualifications of suppliers and contractors

The following could be added to paragraph (c), regarding incompatibility: "... they or, in the case of a legal entity, its management or executive staff, or shareholders with a holding of more than five per cent of the capital, are not, and have not been in the two years prior to the opening of the selection procedure relating to procurement, public agents, whether in the State of origin of the supplier or contractor, or in the implementation of the contract".

Chapter II

We propose that the expression "Metodos de adjudicación" be replaced with "Procedimientos de selección" ("Selection procedures"). This is because the award (adjudicación) is the act that concludes the process of selecting the joint contracting party of the State, and not the procedure in question.

It would be helpful to consider the contract negotiations that are conducted with the intervention of "purchasing agents". These are private firms at an international level used to conduct contract negotiations, ensuring international prices, "standard" quality, etc. They receive a percentage in return and modern international procurement makes extensive use of the system.

Article 14. Conditions for use of two-stage tendering

In (1)(a)(ii) it is helpful to replace the words "índole técnica de los bienes o de las obras" with the words "índole científica, técnica o artística de los bienes o de las obras" ("scientific, technical or artistic character of the goods or construction"). This indicates, without prejudice, that such cases may also give rise to the application of the conditions for use of single-source procurement, as set out in article 16.

Article 20. Provision of solicitation documents

We suggest deleting the last part of this provision: "El precio que la entidad adjudicadora podrá cobrar a los proveedores o contratistas por el pliego de condiciones no podrá exceder del costo de su impresión y de su distribución a los proveedores o contratistas" ("The price that the procuring entity may charge for the solicitation documents shall reflect the cost of printing them and providing them to suppliers and contractors"). It is worth mentioning that, in practice in Argentina, the cost of the solicitation documents has also been a factor, in economically important procurement, in ensuring that tenderers who are really interested take part in the tendering procedure.

Article 27. Tender securities

For the reasons explained under article 2 (subparagraph (g)) above, we suggest replacing the words "garantías de licitación" ("tender securities") with the words "garantías de oferta" ("offer securities").

Article 32. Acceptance of tender and entry into force of procurement contract

In spite of the view expressed by the Working Group, we think it preferable to replace "Desde [el momento en] que se expida" ("Between the time when ... is dispatched") and "al expedirse" ("when ... is dispatched"), in (2)(b) and (4) respectively, with "Desde el momento en que se reciba" ("Between the time ... is received") and "al recibirse" ("when ... is received"), with regard to the notice referred to in paragraph (1) of this article.

Articles 16 and 37. Single-source procurement

It would be helpful to lay down (as in article 8 concerning the exclusion of foreign contractors) that the relevant authority should decide expressly in writing that procurement is to take place in this manner. Such a decision should indicate due and sufficient grounds to demonstrate perfectly that, in the case in point, the conditions set out in article 16 (a) to (g) of the draft apply. This is the only way to prevent the abuse of repeated recourse to this form of procurement, which would tarnish the Model Law's objective of promoting competition, publicity and transparency in the selection procedures.

Chapter V - Review

In general terms, we think it would be better to leave this matter to be dealt with according to the legal provisions prevailing in each country, above all since - as mentioned in the footnote to this chapter - problems of a constitutional nature could arise.

Without prejudice to what is stated, it seems important to include a prohibition of the incorporation into the solicitation documents governing international procurement of clauses - excessively short time-limits for challenges or high challenge securities - limiting the defences available to the tenderer. In any event, if the solicitation documents contain a review system different from that which usually prevails in the country concerned, the system set out in the solicitation documents should be less severe than the general system. This would provide for proper respect for the rights of the tenderer and, indirectly, through the arguments and reasons the tenderer may adduce, there would be greater benefit for the State by virtue of the choice of the most suitable tender.

The proposed structure gives rise to the following comments:

Article 39. Review by procuring entity (or by approving authority)

Despite the views of the Working Group, we think the 10-day period for submission of a complaint is sufficient. It must be borne in mind that, even if the contractor is of foreign origin, he ought logically to establish domicile in the country and ensure the same legal representation. The 20-day period seems rather excessive, considering the need to secure the different stages of the public call for tenders.

Article 42. Suspension of procurement proceedings

We share the view that the submission of a complaint should automatically suspend the proceedings. In our opinion:

- There should be no time-limit on the period during which the call for tenders or the contract may be suspended (seven days with possibility of extension to 30 days). Either nothing should be said about it, with the result that the period of suspension would thus depend on the relevant authority, or it should be specified that the suspension must continue until there is final settlement of the complaint submitted by the tenderer.

- With regard to paragraph (4) of this article, it could be added that, in such instances, the Government should grant sufficient funds for the damages that might be suffered by an excluded tenderer, if it is then determined that the case made by him was valid.

It should be said that the draft only regulates the contract award stage, omitting all reference to implementation.

It would be advisable to include at least some basic guidelines with reference to the contract implementation stage since, at that stage too, although to a lesser extent, there may be situations that are at variance with the transparency that ought to prevail in all procurement operations.

AUSTRALIA

[Original: English]

In seeking to formulate a position on the draft Model Law, we have obtained views, not only of the relevant Commonwealth agencies, but also of the State and Territory Governments.

General observations

We should first say that much of what is in the draft Model Law is consistent with our procurement practices and in some respects would overlap existing legislation such as that dealing with review of administrative decisions. We do have some concerns, however, about some aspects of the Model Law. Central to many of these is the question of whether there is a need for such a Model Law in Australia. We have not formed a final view on this, but this does not detract from our commitment to the principles and objectives of trade law harmonisation generally.

Under the coordination of the Commonwealth Department of Administrative Services (DAS), there has been since 1988, when the Federal Government approved a programme of purchasing reform, a reduction in detailed central regulation of Commonwealth purchasing through the Finance Regulations of the Commonwealth Audit Act 1901. Commonwealth procurement arrangements have been designed for efficient, effective performance of the procurement function, leaving decisions about purchasing-related procedures, such as those about procurement method, to agencies and managers responsible for the function.

Against this background we have some concerns about the "prescriptive" nature of the draft Model Law on Procurement. Relative to the current flexibility allowed for by our procurement arrangements, the draft Model Law if implemented would have a significant impact on our procurement procedures. We are not sure that this impact would be counter balanced by the international harmonisation which the instrument seeks to achieve. It does not appear to contemplate procurement by "common use contract arrangements". It has also been commented that the draft Model Law appears to place an inordinate degree of emphasis on a tendering process leading to acceptance of a tender by a particular procuring authority. There are a variety of tests and criteria relevant to the choice of the appropriate procurement method for each requirements. A standing offer arrangement (or common use contract approach) can enable an effective, efficient and economical means of purchasing commonly-used goods and services.

We believe that a policy framework for government procurement, whether implemented through legislation or administrative arrangements, should provide a clear and unambiguous statement that the prime objective of purchasing in government is to support government programmes by achieving value for money in the acquisition of programme inputs. Further, there should be an acknowledgement that the management of purchasing arrangements needs to be integrated with other activities to achieve the logistical objective of conveying materials to where they are needed, and at the right time.

The prescriptive character of the draft Model Law is one that was pointed out by more than one of those we have consulted. There was a particular concern that chapters II to IV could be seen as representing an approach inconsistent with recent Commonwealth purchasing reforms which have implemented a devolution in procurement authority aimed at increased flexibility.

Chapter V, dealing with rights and obligations, is substantively procedural. Inclusion of such procedural detail may be seen as markedly reducing the options for discretional decision-making which are often considered necessary in procurement.

The draft Model Law places great emphasis on accepting the lowest price tender. This could be seen as diminishing the status of the value for money concept. Symptomatic of this emphasis is the requirement to open tenders in the presence of tenderers and call out the prices. While article 29(4)(c) recognises that valuation of the lowest tender will take into consideration factors other than price, it may be too prescriptive about what a procuring entity may consider.

We also note that the proposed requirement in the draft Model Law, of the post-tender negotiation being prohibited, would be inconsistent with established Australian practice.

One of our correspondents holds the view that the draft Model Law exemplifies philosophies, principles and practices of public sector procurement in the 1960s - procedure rather than outcome driven. Studies during the 1980s revealed that Government purchasing people followed these procedures to the letter rather than trying to achieve:

- Best value for money
- Open and effective competition
- A high standard of public accountability

Recent legislation in regard to public sector procurement has therefore been less prescriptive. For example, there may be no requirement to call tenders for the purchase of <u>any</u> goods. In place of this there may be a requirement to plan major purchases and determine the most effective procurement strategy.

Under the draft Model Law, aspects of the procurement process not previously open to challenge would be opened to judicial review unless specific provision were made to exclude such review. Article 43 of the draft, when read with article 38, does attempt some limitation of judicial review, but more may be necessary. We would need to examine the situation more closely before opening up the process to judicial review since such review greatly reduces the control contracting parties have over any dispute processes, which some may see as an area properly addressed in individual contracts.

Any legislation governing procurement should provide a sufficiently flexible process, while simultaneously ensuring accountablity. At this stage we are not sure that the draft Model Law has the right balance of these competing ends.

Specific Comments on individual articles in the draft Model Law on Procurement

Preamble

Paragraph (a)

Economy and efficiency may be compromised in some circumstances where suppliers and contractors extensively utilise the review and appeal remedies available under chapter V of the draft Model Law.

Paragraph (d)

The concept of the level playing field envisaged in paragraph (d) is admirable. But it could result in a lower than desirable standard being the norm if discrimination on the grounds of nationality is interpreted to mean that the inferior environmental practice of a particular nation's company is not allowed to be considered in an evaluation of competing offers. For how it might be possible to set such standards see also specific comments in relation to article 6(2)(d) below.

Article 1. Scope of application

This seems acceptable; it allows for the enacting State to specify what thresholds are to apply for various types of procurement. Article 1(2)(c) allows for this to be done by regulations.

The regulations could allow for the exclusion of procurement relating to items required for emergencies affecting public health and safety, however, perhaps consideration should be given to including such procurements in the body of the draft Model Law.

The draft Model Law appears to contain a blanket exemption for "procurement involving national security or national defence" in article 1(2)(a). What the exemption means and how broadly it will be interpreted is open to construction, particularly since article 29(4)(c)(iv) contemplates that national defence and security considerations may be relevant to a procurement covered by the draft Model Law.

Article 2. Definitions

"procurement"

The draft Model Law prescribes procedures for procurement as being applicable for both goods and construction. Modern purchasing strategies treat goods quite differently from construction, however. One fundamental difference is that goods are usually manufactured to the manufacturer's design, whereas construction is usually constructed to the purchaser's design.

The definition should perhaps be extended to cover procurement of "services". In some areas of procurement, such as information technology, it is often difficult to distinguish between goods and services. Service contracts are a major component of government procurements. To so extend the definition would also overcome the problem of attempting to interpret the meaning of the word "incidental" in article 2(a).

"procuring entity"

Paragraphs 25 and 26 of page 264 of the 1991 UNCITRAL Yearbook (paragraph 25 and 26 of document A/CN.9/343) say:

"25. A view was expressed that subparagraph (a)(i) should cover not only organs of the Government of the State enacting the Model Law, but also organs of governments of subdivisions of the State (eg, governmental organs of units of a federation and of local units). In response, it was noted that, in some federal systems, the national government could not legislate in respect of procurement for units of the federation or for local government units. However, units of the federation could adopt the Model Law themselves. [emphasis added]

"26. The Working Group considered various possible ways to cover in subparagraph (a)(i) organs of all levels of government and also to take account of the needs of federal States that could not legislate for governments of their subdivisions, but no satisfactory solution was found. Ultimately, the Working Group agreed to provide two alternative versions of subparagraph (a)(i). One version would cover all governmental organs, including governmental organs of subdivisions of a federation. It would be adopted by non-federal States and by federal States that could legislate for their subdivisions. The other version would cover only organs of the national Government; it would be adopted by federal States that could not legislate for their subdivisions."

Regarding article 2(b)(i): if we assume that option I of article 2(b)(i) is intended to cover all governmental organs, including governmental organs of subdivisions of a federation, then the definition would appear to be appropriate.

Option II may currently present a difficulty if the reference is to the national "government", since sub-federal governments will be subdivisions of the State of, for example, Australia, but not of the Australian "government". The options should perhaps read "any department, agency, organ or other unit of (name of State) or of any subdivision of (name of State) that engages in procurement, except...".

In relation to article 2(b)(ii): there is a growing tendency for governments to purchase through brokers or contract out their purchasing operations. Both of these options are potentially outside the scope of the draft Model Law. Article 2(b)(ii) allows for the inclusion of specific entities, but since the agents which might be used would not be known in advance, perhaps there should be a clarification that procurement by a procuring entity includes procurement through brokers or third parties.

Other

Perhaps consideration should be given to including definitions for the words "tender", "quotation", and "negotiation". The body of the draft Model Law uses both the words "tender" and "quotation". In general usage both are offers to supply, the difference being the procedures employed and monetary threshold.

Article 5. Public accessibility of legal texts

This is commendable. The Commonwealth of Australia has an advanced and comprehensive system of tribunal review of administrative decision making, access to and freedom of government information, and judicial review of the lawfulness of administrative decisions.

Article 6. Qualifications of suppliers and contractors

No comments at this stage. Article 6 (2)(c) does seem, however, to potentially limit the meaning of the term "financial resources" in article 6(2)(a).

The phrase "false or inaccurate" in article 6(6) should be amended to the word "inaccurate". Otherwise confusion could emerge as to whether one adds meaning to the other.

It might be said that article 6(3) is too restrictive and that it should be broadened to allow procuring entities the right to obtain assurances from tenderers if doubts arise after tenders close.

We refer to the comments above in relation to paragraph (d) of the preamble and add that as article 6(2)(d) deals with social security obligations it would be equally possible for the inclusion of provisions to set some international standards or benchmarks on environmental workplace health and safety, and award wages and conditions.

Article 7. Pre-qualification proceedings

In relation to article 7(7), unsuccessful bidders could usefully be given reasons when an offer has been rejected. Explaining to bidders the reasons for their non-selection against the evaluation criteria may result in prospective bidders submitting better proposals in the future. While we recognise that the provision allows such reasons, the provisions of article 7(7) that procuring entities are not required to specify evidence or give reasons when suppliers are unsuccessful at the pre-qualification stage differs from the practice in Australia.

Article 9. Form of communication

This seems to be an attempt to deal with EDI communications. It does not, however, deal with the requirement at article 25(5) that tenders be in a sealed envelope, and possibly even that they be in writing. It also does not provide for EDI authentication as well as signature under article 32.

One of our correspondents has expressed the view that consideration perhaps should be given to drafting article 9 such that there is no contemplation that suppliers and contractors have unfettered rights to communicate verbally. Such a practice would be inappropriate if abused.

Article 12. Inducements from suppliers and contractors

If "services" procurement is included in the draft Model Law, article 12 would require rewording on "offer for employment" to cover "outsourcing" of activities by entities.

Article 15. Conditions for use of request for quotations

Article 15(1) demonstrates the need for a clear definition of "quotation" in article 2.

Article 17. Domestic tendering

We note that the discretion in article 17(b) is not excluded from the review procedures provided for in chapter V. Article 17 recognises the requirements of efficient procedures for small contracts. We note that review in chapter V is excluded in respect of decisions under article 18, presumably in recognition of the efficiency requirements.

Article 20. Provision of solicitation documents

The phrase "the cost of printing them and providing them to suppliers and contractors" may not be sufficiently broad to cover the actual cost. A more inclusive term might be "the cost of their production and supply". Perhaps a decision has been taken by the Working Group that the lower amount be used, however.

As currently drafted the provision could be open to the interpretation that the decision by the procuring entity to charge would be discretionary because of the existence of the word "may". But once that decision is made the charge "shall reflect only the cost of printing and providing them to suppliers and contractors", that is, there is no discretion to charge below that formula.

In light of the above two concerns perhaps the provision should be re-phrased to allow a procuring entity to charge for the provision of solicitation documents at a rate that "does not exceed the cost of their production and supply".

We note that the provision is silent on whether the procuring entity may impose different charges on different tenderers.

Article 21. Contents of solicitation documents

The opening words of article 21 use the words "include at a minimum" while the words "contain at least" are used in article 19(1). A consistent formula should be used.

Article 21(q) should be expressed to make it clear that this procedure is necessary only when the public opening of tenders is required.

Article 22. Rules concerning description of goods or construction in pre-qualification documents and solicitation documents; language of pre-qualification documents and solicitation documents

The comment has been made to us that the preferred approach now is to prescribe the function or task to be performed rather than prescribe the technical data. Where the solicitation documents prescribe the function or task to be performed, the onus is on the supplier to provide goods which perform that function or task. Perhaps this concern could be met by replacing the first sentence in article 22(2) with the following: "To the extent possible, any specifications, plans, drawings, designs, and requirements shall be based on the relevant objective technical, quality and functional characteristics". A similar amendment could be made to article 22(3)(a).

Article 25. Submission of tenders

Article 25(1) should also specify a location for the lodgement of tenders.

Article 25(5), requiring tenders to be submitted in a sealed envelope, would appear to be out of step with the modern practice for the procuring entity to receive tender responses by fax and electronic data interchange (EDI).

Article 25(6) emphatically states that late tenders shall not be opened and shall be returned to the supplier. Where there is evidence that a tender is late because of mishandling by the purchasing authority or by an official postal or telecommunications service, procedures could allow for the admittance of a tender in special circumstances.

There may not be sufficient information on the envelope to allow for the unopened tender to be returned to the tenderer. The practice is to open the late tenders, notify the tenderer they are late and request reasons why it should be considered. These reasons and the content of the offer may be grounds to reject all tenders and recall offers. Such a provision would necessarily involve discretionary decision-making allowing for recourse to remedies under the review provisions in chapter V.

Article 28. Opening of tenders

The time of opening of the tenders referred to in article 28(1) should perhaps be at a time which is as soon as practicable after the deadline for submission of tenders.

Regarding article 28(2) and 28(3), the practice contemplated by these paragraphs places the emphasis on the price as being the main factor on which the contract is let, and thereby could be seen as giving the suppliers the wrong message. Modern practices try to achieve maximum value for money and price is only one of the factors considered. There are many examples where the cheapest price has resulted in the most expensive outcome. The procedure of announcing the tender price seems to be rather simplistic in view of the above and in view of the size and range of possible projects that the draft Model Law could cover. This could be a provision in which it might desirable to introduce a discretion whereby the procuring entity could nominate a feature, if any, other than price to be announced at the time of opening of tenders. The exercise of such a discretion would be reviewable under chapter V.

The opening of tenders in the presence of tenderers is often not the Australian practice. The "public" opening of tenders places too much emphasis on the lowest price especially if the offer is inconsistent with or does not meet the specified requirements and conflicts with the policy of examination of all factors to determine "value for money". This "value for money" concept is consistent with article 29 provisions. The public opening of tenders might also contravene confidentiality considerations.

Further, the disclosure in article 28 is inconsistent with the provisions of article 11. In article 11 disclosure is made after acceptance of an offer when details are provided to tenderers but excluded are price and further information if this information is considered not in the public interest or would inhibit fair competition.

Article 29. Examination, evaluation and comparison of tenders

As mentioned above price may be only one of the factors considered in the evaluation of tenders and purchase options. The State Supply Board in one of our sub-federal States requires, for example, that each of the items to be costed over their expected useful life, taking into account the following factors in addition to those listed in article 29(4)(c)(ii):

- production capacity
- residual value of equipment
- life of equipment
- rate of borrowing (i.e. the discount rate)

The technique used here is referred to as Life Cycle Costing. The result is the expression of each option on the same basis for rational comparison. These are Net Present Value (NPV) or Equivalent Annual Value (EAV).

Other factors taken into account in letting tenders include:

- quality assurance provided by tenderer
- environmental factors
- employment of union labour (Construction contracts)

Article 29(1)(b) imposes an extensive obligation on the procuring entity. This is because the words "purely arithmetical errors apparent on the face of a tender" are open to a wide interpretation which could make the mandatory duty on the procuring entity envisaged in article 29(1)(b) extremely difficult to discharge, particularly in the circumstances, for example, of large construction tenders. There would be little doubt that the duty would be one in respect of which a supplier or contractor claiming to have suffered loss would be entitled to seek review under article 38 as that provision is currently worded. Article 39(4)(b) could presume the head of the procuring entity as having power to indicate the corrective measures to be taken including conceivably the power to award, or suggest, damages. The complainant has further rights under article 40 whereby, under the article 40(f), there is power to require payment for loss. These remedies may be disproportionate in view of the nature of the original breach. They could therefore be seen as inequitable in view of the arithmetical error having been made by the complainant in the first instance. To correct this, the word "shall" in the first sentence of article 29(1)(b) should be changed to "may". Consideration should also be given to including amended article 29(1)(b) in the exception provision of article 38(2).

Article 30. Rejection of all tenders

Does "but is not required to justify these grounds" absolve the procuring entity from review obligations under chapter V? If so, article 30 should perhaps be cited in article 38(2). Review rights should be excluded from any decisions made under article 30 on the grounds of equity and proportionality. This seems to be implicitly recognised, at least in respect of liability, in article 30(2) which specifically precludes any liability attaching to the procuring entity towards suppliers and contractors that have submitted tenders.

Article 31. Negotiations with suppliers and contractors

One of our States advises that it is usual for negotiation to take place between the procuring entity and a supplier or contractor and this may be necessary in many instances for economic development, domestic investment, and employment opportunity. Post-tender negotiation is permitted in that State within strict guidelines.

Article 32. Acceptance of tender and entry into force of procurement contract

Regarding article 32(1) to 32(3): it may be questioned whether the notice of acceptance of a tender should be given before all approvals have been obtained.

Article 36. Request for quotations

It has been said that the use of the term "one price quotation" is confusing and it could be inferred that alternatives in terms of brands and other matters would not be permitted.

Review

At the Annual Session we expect we will have some comments on review, including the possibility of an aggrieved party effectively halting a project while the review is being undertaken. While we are still considering the issue, the observation has been made that the extent of the review and appeal provisions are such that they might be used in a capricious or vexatious fashion to frustrate or delay public works projects.

Article 38. Right to review

The concept of "breach of duty" could have extensive effects regarding liability, on the basis of any one of various causes of action, of the procuring entity. Perhaps this risk could be mitigated with a reference to exercise of a discretion in decision-making.

Article 38(2) should be amended to include the above comments made in relation to specific articles.

We are not always sure how this article will operate largely because of uncertainty about what is the relevant breach of duty. For example, does it allow review of the judgment reached by the procuring entity under article 34(9)(d)? Presumably there could only be review if the procuring entity did not consider the supplier unreliable or incompetent, but nevertheless refused to evaluate its proposals. Likewise we are uncertain of the extent to which decisions under article 36(3) and some other provisions are reviewable.

Article 40. Administrative review

We are uncertain as to the extent of consequential damages allowed under option II of article 40(f), because the extent of the necessary connection between the loss and the procurement proceedings is not immediately apparent.

BOLIVIA

[Original: SPANISH]

The Draft Model Law on Procurement contains useful new elements in relation to current legislation in Bolivia. Thus, subject to scrutiny with Bolivia's domestic regulations, the provisions of the draft Model Law may be usefully taken into consideration in the enactment of new statutory provisions on procurement.

We consider, however, that the Model Law has one basic limitation, in that it will have to be referred to the Legislature for approval. The legislative bodies of the member States will thus have full powers to examine and - if deemed appropriate - amend the draft Model Law at the various stages of the legislative process, which, in the case of Bolivia, are provided for in the country's Constitution.

For this reason, the Model Law that is ultimately formulated by UNCITRAL will not be a binding instrument. Its value will thus be rather as reference material in any drafting of statutory provisions on procurement. Limitations in the consideration of a multilateral agreement on procurement are to be expected, since it is only as a non-binding document that it could be approved by the Legislature without having to be amended.

In view of the foregoing, the Government of Bolivia considers that the following suggestions should be taken into account in the examination of the draft Model Law:

1. There should be a stipulated monetary amount beyond which States would have to act in accordance with the stipulations contained in the Model Law. The following text should therefore be included as article 1(2)(b): "Procurement for amounts that are subject to procedures applicable to minor acquisitions in accordance with the respective domestic regulations".

2. With regard to article 29(4)(d), it is necessary to include a specific reference to the possible existence of regulations authorizing a margin of preference for the benefit of domestic tenderers. In the case of Bolivia, a 10 per cent margin is allowed on the total points awarded. The text of the first three lines should therefore be amended to read as follows: "If authorized by the domestic procurement regulations, in evaluating and comparing tenders, a procuring entity...".

3. With regard to chapter IV - Procedures for procurement methods other than tendering - it should be pointed out that, under Bolivian law, the only method provided for in respect of international procurement is public tendering. Such proceedings are conducted through specialized agencies engaged by the Executive through the Ministry of Finance. These agencies act as authorized representatives of the public entities in the procurement process. Also, article 209 of Supreme Decree No. 21660 lists six circumstances in which procurement proceedings do not have to take place through specialized agencies. Thus, those provisions contained in chapter IV of the draft Model Law that are not contrary to Bolivian legislation may be adopted.

COLOMBIA

[Original: Spanish]

Legislation on procurement in Colombia, both that currently in force and that which it is intended to enshrine in a new draft law now before the Congress, establishes special principles that differ markedly in their philosophy from those embodied in the draft Model Law that has been submitted for our consideration, although these differences are clearly narrowed in the new draft law on procurement.

To explain this statement, it suffices to recall that our legislation provides for preferential treatment for domestic offers, through principles such as technological unpackaging and the assignment of preference, all conditions being equal, to the offer of domestic origin.

Notwithstanding the above, some of these restrictions have been eliminated from the draft that is now passing through Congress, but the stipulation of preference to nationals remains as a minimum when, under equal conditions, they submit offers competing with foreigners.

Similarly, procedures provided for in the draft, such as "prequalification", or two-stage tendering, conflict with guiding principles embodied in administrative procurement and in the civil service in general, which are required, inter alia, to be economical and speedy. In our draft, "prequalification" has been replaced by a simple step of registration with the Chamber of Commerce.

Our comments relating to the contents of the articles of the draft are as follows:

Article 2 (d): We consider that the listing of activities looked upon as "construction" is very specious and that there is a risk of overlooking or leaving out some types of construction work that might also be included.

Article 6 (2): We think it is dangerous for the procuring entity to be able, at any stage in the procurement proceedings, to require such information as "it may deem useful" from tenderers, since this requirement limits the right to protection of intellectual property and trade secrets.

Article 7: This article provides for prequalification of suppliers or contractors. We consider that this specific procedure prior to qualification is unnecessary, especially if it is taken into account that, under Colombian legislation, there is a separate procedure, namely, the Register of Suppliers and Contractors, which must be kept up to date as regards existence, legal representation, qualifications, capacity, etc. Also, to add to the procedure for qualification of offers one of prequalification is quite impractical and would give rise to delays, in comparison with our system, which is more flexible and simpler.

Article 7 (8): Furthermore, it seems not very practical and efficient that, once the qualifications of a supplier or contractor already prequalified have been confirmed, they should be required to reconfirm their qualifications "in accordance with the same criteria utilized to prequalify" them.

Article 8 (1): This provision does not explain very well whether the procuring entity can decide to limit participation in the procedure for reasons other than nationality.

Article 10: It is advisable to standardize the rule for "legalization" in this provision.

Article 11: This article does not make clear why it limits the right of inspection as it does. In addition, one of the basic principles embodied in Colombian legislation is that of confidentiality in respect of proposals and qualification prior to procurement, and this principle is at variance with the provisions in article 11 of the draft.

Article 16: With regard to the provision contained in subparagraph (a), there are no exclusive rights for a contractor under Colombian law.

Article 21: This article provides that the solicitation documents must include the contract that would be signed once the tender has been accepted. This would limit the negotiating capacity of the parties. It is recommended that a minute or draft contract, without the essential elements such as value, time periods and other special conditions, but not the contract itself, should be included.

Article 32: This article provides that the contract will enter into force before the tender is approved, and this runs counter to principles of law.

EGYPT

[Original: Arabic]

Regarding article 2 (b), which defines the procuring entity, we are in favour of option II for subparagraph (i), which reads: "any department, agency, organ or other unit, or any subdivision thereof, of the ('Government'...) that engages in procurement...", as the subparagraph has been drafted in more general terms than option I, thereby covering all the State agencies, their divisions, subdivisions and subordinated organs, including the private sector companies as these are subordinates of the State.

The first phrase of article 6 (2) which reads "Subject to the right of suppliers and contractors to protect their intellectual property or trade secrets" should be excluded, since such rights are usually established in the interest of inventors or authors themselves, with the exclusion of suppliers and contractors that engage in such activities as implementation or promotion of goods and services, the subject-matter of contract.

Article 6 (6) concerning the cases where "The procuring entity may disqualify a supplier or contractor" should be amended by adding that the procuring entity (department) may do so if it finds that at a previous time a contract has been concluded with a supplier that committed an "extensive" breach of contractual obligations, as well as where it finds that a supplier or contractor has previously been sentenced in a felony - a situation which is in accordance with the provisions of Egyptian legislation.

A new item should be added in article 6 (1) concerning the qualifications of suppliers and contractors, which would state that the procuring entity (department), in order to ensure the seriousness of suppliers and contractors in applying to tender, may require the submission of a temporary deposit in accordance with the laws of each State.

Article 6 (5), which provides that the procuring entity shall establish no criterion ... that discriminates against or among suppliers and contractors or against categories thereof on the basis of nationality, should be amended by adding a reference as follows: ", taking into consideration the provision of article 8 (1), concerning the right of the procuring entity (department), on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality".

The wording of article 12 on "Inducements from suppliers and contractors", which authorizes the procuring entity (department) to reject tenders, should be amended by adding a reference to cases in which an officer or employee of the procuring entity abstains from doing a certain job that ought to be done, whereby the procuring entity (department) shall be entitled to reject the tender submitted by the supplier or contractor that gave the officer or employee of the procuring entity an inducement to abstain from doing a certain job.

A new sentence should be added to the article referring to the right of the procuring entity (department) to reject a tender submitted by a supplier or contractor if the latter gives an inducement to an officer of the procuring entity, even where the supplier had no knowledge of the non-competence of the officer in question with respect to the job required, which is in accordance with the Egyptian Law.

We therefore suggest that article 12 should be redrafted as follows:

> "The procuring entity may reject a tender, proposal, offer or quotation if the supplier or contractor offers or promises or agrees to give to any current or former officer or employee of the procuring entity, regardless of the competence or non-competence of the officer or employee, a gratuity, whether or not in the form of money, an offer of employment or any other thing or service of value, as an inducement to carry out or to abstain from carrying out an action that ought to be done, or to violate the duties of his office."

Article 42 of the draft Model Law, concerning the suspension of procurement proceedings as a result of the timely submission of a complaint, should be amended in view of the fact that the suspension of procurement proceedings, whether before or after the entry into force of a contract, as a consequence of the submission of a complaint will not be compatible with the importance of the contracts concluded by the department, which require expeditious implementation as they are associated with the public interest of the State, especially where a contract is related to the operation of a public facility. In that connection, the rule which is adopted by the Egyptian Law is that the orderly and steady operation of public facilities precludes both the interruption of contract implementation and procurement proceedings. It is also an established rule that a contractor that has a contract with the procuring entity (department) may not abstain from fulfilling its obligations

on the pretext of failure on the part of the procuring entity (department) to fulfil its contractual obligations, unless the fulfilment of obligations by the contractor is made impossible by such a failure - since, according to the rules, the implementation of decisions on administrative disputes, including contracts, may only be suspended under exceptional circumstances, if the court decides to take such action, or if the fulfilment of the contractor's obligations is made impossible as a consequence of slackness on the part of the procuring entity (department) in carrying out its obligations. We therefore suggest that article 42 should be amended as follows:

> "The submission of a complaint under article 39 may only suspend the procurement proceedings if it is established that such a suspension will not be incompatible with the good and orderly conduct of work by the procuring entity and that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will be accepted and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors."

We also suggest that paragraph (2) of the same article should be removed for the same reasons as mentioned above.

We further suggest, with regard to wording, that the term "not frivolous" in article 42 (1) should be changed and that the words "a serious one" should be used.

Article 43 on "Judicial review" should be amended, because such a term might imply a different meaning from that which is intended by the legislation of certain States whose legal systems include a means of petition for review. This is an exceptional means of objection to decisions, which entitles the competent court to review prior judgements, even after they have become final and effective, where new factors and circumstances that were not known before have made their appearance and imply as a consequence a change in decisions made by the courts. The provision in the draft Model Law on Procurement, however, is intended to determine, in each State, the court having jurisdiction over objections presented in respect of administrative decisions concerning State contracts.

MALAYSIA

[Original: English]

1. The draft Model Law on Procurement generally sets out the basic legal rules regulating the procedures for procurement. These rules regulate, inter alia, the procedures for selecting the contractor or supplier from which the goods, construction or incidental services are to be procured, methods of procurement and their conditions for use, tendering proceedings and the rights of recourse by participants in procurement proceedings who are aggrieved by actions or decisions of the procuring entity that are contrary to the applicable rules and procedures. The Model Law has been drafted so as to be applicable both to domestic and to international procurement.

2. The scope of application of the Model Law is confined to the procurement of goods and construction and not to services, except services that were incidental to the goods or construction being procured. The types of procuring entities regulated by the Model Law are the governmental departments or agencies and such other entities to be determined by each State implementing the said Law. It is to be noted that although the Model Law sought to cover all types of procurement of goods and construction in order to achieve the greatest degree of uniformity in the law relating to procurement, certain types of procurement have been excluded, for example, procurement in cases where national defence or national security is involved. However, the procuring entity would be able to apply the Model Law to procurement that fell within an exclusion if the entity wished to do so. In order to promote transparency, the application of the Model Law in such cases would be brought to the attention of the contractors and suppliers in the tender solicitation documents.

3. It is important to note that the Model Law, in its preamble, has identified several procurement policy objectives. An examination of the provisions of the Model Law clearly showed that they are structured so as to achieve those objectives.

4. The Model Law sets forth clearly the mutuality of obligations between the procuring entity and participating suppliers and contractors. In many instances, suppliers and contractors have a right to require compliance with the law by the procuring entity. In this regard, chapter V of the Model Law provides a right of recourse for suppliers and contractors in the event of a failure of the procuring entity to comply with the procurement law. On the other hand the procuring entity has the right to reject all tenders at any time prior to the acceptance of a tender, and the supplier and contractor in such cases cannot recover from the procuring entity the costs of preparing and submitting the tenders (article 30).

5. To meet its objective of achieving transparency, the Model Law has provided clearly the rules and procedures to be followed by the procuring entity and by the suppliers and contractors participating in the procurement proceedings. Under article 6, for example, the procuring entity is required to set forth in the prequalification documents the qualification requirements that would be applied to the suppliers and contractors. The procuring entity is also required, under article 11, to prepare a record of the procurement proceedings which should include all the matters as stipulated thereunder. The Model Law has also set out clearly the procedures to be followed by the procuring entity for soliciting tenders and the required contents of solicitation documents.

6. In order to promote economy and efficiency in procurement, the Model Law has incorporated procedures that promote competition among suppliers and contractors and provide a favorable climate for participation in the procurement process. The preferred procurement method under the Model Law is tendering. The provisions regarding tendering proceedings are clearly set forth in chapter III of the Model Law. Although other methods of procurement such as request for proposals, competitive negotiation, request for quotations and single-source procurement are available, these methods may only be utilised in specified circumstances. The Model Law has laid out certain criteria to guide the procuring entity in the choice of the most appropriate method to be used in a particular case. Once the procuring entity has decided to use a particular method, it should conform to the rules in the Model Law relating to that method.

7. With regard to meeting its objective to encourage participation in procurement proceedings by suppliers and contractors of all nationalities, where appropriate, the Model Law has provided in article 8 that suppliers and contractors are permitted to participate in procurement proceedings without regard to nationality. The procuring entity would only be able to limit participation in procurement proceedings on the basis of nationality on grounds that are specified in the procurement regulations or according to provisions of Law.

8. The Model Law has provided in chapter V a right of recourse for participants in procurement proceedings aggrieved by actions or decisions by the procuring entity contrary to the Law. The provisions are necessary in order to promote confidence in and the integrity of the procurement process. It is to be noted that the question of the forum where such recourse could be sought would be dependent upon the legal and administrative structure of States. Therefore the Model Law has provided generally formulated alternatives, from which a State can choose those that it wishes to implement. Thus, States in which hierarchical administrative review of administrative actions, decision and procedures is not a feature of the legal system may omit article 40 regarding administrative review and provide only the judicial review as provided in article 43.

9. Based on the above paragraphs, it is noted that, in order for Malaysia to adopt the Model Law on Procurement, its procurement policy objectives should be consistent with the objectives set out in the Model Law. This is in view of the fact that the provisions of the Model Law are structured so as to achieve those objectives. The provisions of the Model Law, as already noted above, are "transparent" as the rules and procedures to be followed by the procuring entity and by the participants are made known to the suppliers and contractors participating in the procurement proceedings. Participation in the procurement proceedings, unless clearly provided otherwise in the procurement laws and regulations, should not be limited to a certain nationality only. Further, to promote economy in procurement, all interested suppliers and contractors should be allowed to compete to supply goods or construction, and the Model Law has identified tendering as the preferred method of procurement.

10. Even if Malaysia chose not to adopt the Model Law, it may be used as an instrument to assist Malaysia in restructuring or improving its procurement laws and procedures. It is to be noted, however, that if the Model Law were to be adopted by other countries, it would promote greater international confidence in procurement, which would benefit international trade.

POLAND

[Original: English]

Article 2: The list is not complete. The procurement of services should be taken into account (as for example of the expertise or analysis).

Article 8: The participation in procurement proceedings can be limited only on the basis of the citizenship and not on the basis of the nationality (in the sense of belonging to ethnic community or nation).

SPAIN

[Original: Spanish]

The following remarks have been made after study of the "Draft Model Law on Procurement" prepared by the United Nations Commission on International Trade Law.

1. The "draft" analysed is clearly derived in its principles from the European Community rules on procurement and seems to be conceived as a tool for laying a uniform foundation for procurement, to serve as a model for all those States (fundamentally, of Eastern Europe and Africa) which, for one reason or another, lack appropriate legal regulations and experience in this matter. In view of the importance of procurement to all economies that are in the phase of development or reconstruction, the draft aspires to be from the outset an appropriate tool - through incorporation in State legislation - for achieving a standard of guarantees that would permit the participation of enterprises from all countries in the familiar field of procurement, with the greatest possible level of legal security.

That having been stated, it is desirable to make two specific remarks: the first of them to recall that the draft Model Law is not in the nature of a contract and does not aspire to be converted into an international treaty; when it has been approved, it will not be binding on the States from the formal legal point of view. It is, as its name indicates, only a model capable of inspiring State legislation. Therefore it has, from this point of view, no effect on the Spanish Administration or - under international law - on the Spanish State.

Secondly, it can be noted that the above-mentioned "standard" of guarantees contained in the draft is therefore rather less rigorous than that incorporated in Community law and Spanish legislation (both the prevailing law on State contracts and the draft law on procurements by the public authorities), so that, in addition to the fact that the draft has no formal binding force, its content adds nothing to existing Spanish law from the substantive point of view.

2. With regard to the concrete text of the draft, the following observations are made:

2.1. Article 2 excludes from its scope of application management contracts for public services, limiting its rules to contracts for works, supply, and, to the extent that they are accessory to the latter, buying and selling and leasing. In view of the importance of contracts for the management of public services - and unless there are specific motives that would justify their exclusion, which are not known to us, since the background information is not available - such contracts could well be included in the draft. The partial relinquishment of public authority (and in the widest sense, to a certain extent, of sovereignty) that could be involved in contracts by which the management of a service is entrusted to a third party is offset by the adequate safeguards provided for in the draft regarding requirements applicable to the contractor - including nationality requirements (cf. article 8.1).

2.2. The drafting of article 17 [in the Spanish text] could be improved by making a clearer division between paragraphs (a) and (b) and the part of the principal clause covering both, which is now incorporated in paragraph (b).

2.3. The obligation contained in article 18(2) to publish invitations to tender in a journal of wide international circulation seems to be excessively onerous for the States - and even for the contractors, if the cost of publication is to be borne by them. It should suffice to publish such invitations to tender in the appropriate official gazettes or publications, and it cannot be regarded as an excessive or disproportionate burden that interested parties should have to consult the latter.

3. For the rest, no substantive remarks need to be made on the draft as a whole. As pointed out earlier, it is inspired by the principles on procurement that are characteristic of Community law - and these are in turn common to the principles followed by the countries, both within and outside the Community, that are more highly developed in this field.

TRINIDAD AND TOBAGO

[Original: English]

Article 6. Qualifications of suppliers and contractors

Amend paragraph (7) to read as follows:

> "Except where prequalification proceedings have taken place, a supplier or contractor that claims to meet the qualification criteria shall not be precluded from participating in procurement proceedings for the reason that it has not provided proof that it is qualified pursuant to paragraph (2) of this article if the supplier or contractor undertakes to provide such proof within seven (7) days of a request from the procuring entity, and if it is reasonable to expect that the supplier or contractor will be able to do so."

Article 7. Prequalification proceedings

Amend the first sentence of paragraph (4) to read as follows:

> "The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within seven (7) days."

Amend the seventh sentence of paragraph (7) to read as follows:

> The procuring entity shall upon request communicate to suppliers and contractors that have not been prequalified the ranking and points under each criteria.

Article 11. Record of procurement proceedings

Amend the first line of paragraph (3) to read as follows:

"The portion of the record referred to in subparagraphs (c), (e), (f) and (g) of ..."

Article 21. Contents of solicitation documents

Amend subparagraph (x) by inserting after the word "and" and before the word "approval" in line 4, the words "where applicable".

Article 25. Submission of tenders

Amend paragraph (5), by adding at the end thereof the words "after tenders are opened".

Article 28. Opening of tenders

Amend paragraph (2) by adding at the end thereof the following new sentence:

"In addition, other members of the public may be permitted subject to the availability of spaces (seats.)"

Article 29. Examination, evaluation and comparison of tenders

Amend paragraph (1) (b) to read as follows:

"Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall give notice of purely arithmetical errors apparent on the face of a tender. The procuring entity shall give notice thereof to the supplier or contractor that submitted the tender."

Replace paragraph (3) (b) by the following new text:

"If the supplier or contractor that submitted the tender amends the tender price for any reason whatsoever".

Add at the end of paragraph (5) the words "which currency shall be stated by the procuring entity".

Article 34. Request for proposals

Delete from paragraph (4) (c) the words "expressed in monetary terms to the extent practicable".

TURKEY

[Original: English]

Article 2. Definitions

Taking into account the scope of application and the internationality of the draft Model Law, it would be appropriate to re-draft this article so as to include definitions of "rental" and "lease or hire-purchase of goods", which are referred to in sub-paragraph (a).

Article 18. Procedures for soliciting tenders or application to prequalify

It would be appropriate to introduce a deadline for applications for the invitations to tender or to prequalify, which could be defined according to the existing international traditions.

Article 27. Tender securities

It would be useful to have an additional paragraph with respect to a "certain percentage of the bid value to guarantee tender security" as a precondition of participating in procurement proceedings.

It would also be helpful to define the term "solicitation documents".

YUGOSLAVIA

[Original: English]

General remarks

The draft Model Law on Procurement contains provisions very much needed in many countries - especially those which are seeking international technology, know-how, equipment and capital goods. Nevertheless, the draft - as a whole - is too much oriented to participation of international suppliers and contractors, and exceptions in favour to the domestic ones are indeed marginal. In many countries the reality of life would often require engaging domestic suppliers and contractors - especially in view of the fact that financial resources are lacking in many developing countries.

There is a disproportion between the part of the draft devoted to the substantive provisions and the part which deals with remedies. The part on review procedures contains five articles only - some of which are in a rudimentary form (see for instance, art. 43; in many countries the judicial review would indeed be the only procedure in cases of unlawful procedures). For this reason, it is suggested:

a) to delete entirely the part which deals with the question of reveiw, or

b) to leave this question to the applicable law, or

c) to elaborate in more detail some of the rights which the aggrieved party might have if the procuring entity commits an unlawful act by which the suppliers and contractors suffered loss and/or damage.

Many provisions in the draft are too detailed (see, for instance, art. 21 which lists the required contents of the solicitation documents).

It is not clear why chapter II (Methods of procurement and their conditions for use, articles 13-16), is not connected with chapter IV (Procedures for procurement methods other than tendering, articles 33-37). Although there are probably some reasons for this, for the reader and the user of the Model Law it would be easier if the relevant provisions were found in

the same place. Should this remark be found to be justified, the only article which would have to be removed from its position would be article 13, which would in fact would be more appropriately placed in chapter III which deals with tendering procedure.

Specific remarks

Article 2. Definitions

Option II for subparagraph (i) is a better one since it is more comprehensive and would be useful especially in cases when it is not clear as to who may fall under a definition of a "procuring entity". If this option were to be favoured by a majority, then the brackets under (ii) should also be deleted.

On the other hand one may question why a definition of "procuring entity" is not more simplified. A single definition may embrace all public organs and entities (enterprises) which a State enacting the Model Law includes in a definition of a procuring entity (in such a case (i) and (ii) should be combined in a single definition).

A more simple definition would be in the interest of a State enacting the Model Law, since the public organs, department and other governmental units subject to the Model Law may vary from one state to another and therefore the State should be left with full freedom to determine which entities are "procuring entities" for the purpose of the Model Law.

Article 12. Inducements from suppliers and contractors

This article is well drafted and it should remain in the Model Law. Its usefulness is obvious and evident and there is no need to elaborate on it. Moreover, this article should be supplemented by another paragraph according to which if an unlawful practice would be discovered the whole procedure should be annulled and a new one established. The second sentence in article 12 for that purpose is not sufficient.

The answer to this remark could be that there is a provision in article 40(3)(e), but the same idea should be reflected in article 12 as well.

Article 17. Domestic tendering

Since the whole Model Law is in fact aimed at international tendering, article 17 should not start with the situation which is considered to be an exception rather than the rule of the Model Law. The suggestion is not that such a provision should be deleted, since it is very significant for each State, but perhaps it should be put as a separate article, after an article that would emphasize the principle in the Preamble, that tendering proceedings should include all participants "regardless of nationality". Since it is the supreme objective of the Model Law to promote international trade, which indeed is the task of UNCITRAL, domestic tendering should be treated as an exception and the place of the relevant articles should reflect this.

Article 29. Examination, evaluation and comparison of tenders

According to paragraph (2)(b), the "procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics ... set forth in the solicitation documents ... " Without questioning the need for such a provision, it may nevertheless be noted that such provision gives rather wide discretion to the procuring entity to consider a tender as responsive even in the cases when such deviations may be more than "minor". The provision should remain since it would help the tendering procedure to proceed, and in practice abuses of such a discretion of the procuring entity would indeed be rare, but in a commentary attention may be drawn to possibilities of such abuses.

Article 30. Rejection of all tenders

According to the Yugoslav law on obligations, rejection of all tenders "if so specified in the solicitation documents" would not be considered as true tendering, but rather conditional tendering. However, since this rule is reflected in many solicitation documents, it should remain in the Model Law. The fact that the procuring entity is not obliged to justify the grounds for rejection in that respect is clear and cannot be disputed. Our suggestion, however, would be to clearly explain this right of the procuring entity in the commentary.

Article 31. Negotiations with suppliers and contractors

This article should be redrafted so as to prohibit the procuring entity from negotiating with a supplier or a contractor before the tender is accepted, while recognizing that afterwards negotiations are in fact needed and useful for both parties. The idea in the article is clear, but perhaps some slight redrafting may help to distinguish between the period before and the period after the acceptance of the tender.

Articles 40 and 43. Administrative and judicial review

The general remark (as has already been pointed out above) is that the whole part of the Model Law concerning the review procedure is not sufficient to adequately protect the party against an unlawful procedure. For this reason (irrespective of the difficulties) an effort should be made to define an "unlawful act" (or procedure) within the meaning of the Model Law. If it would be difficult to include a definition of an unlawful act, perhaps a commentary could provide illustrative examples of unlawful acts. The suggestions therefore are:

a) to define an "unlawful act" (procedure);

b) to define the circumstances in which an administrative organ or a court has the right to annul the procuring procedure;

c) to specify when and in which cases the administrative organ or a court may decide on compensation as well as to specify whether the compensation should be given to all participants or only to those who suffered damages due to an unlawful act.

* * *

UNITED NATIONS

GENERAL

ASSEMBLY

Distr.
GENERAL

A/CN.9/376/Add. 1
10 June 1993

ORIGINAL: ENGLISH AND
FRENCH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-sixth session
Vienna, 5 - 23 July 1993

MODEL LAW ON PROCUREMENT

Compilation of Comments by Governments

Canada

The Government of Canada believes that the draft Model Law on Procurement, as adopted by the UNCITRAL Working Group on the New International Economic Order at its 15th session, is generally of a high order of quality and represents a fair and reasonable balance between the interests of procurement entities and those of contractors and suppliers. It would also promote transparency in the bidding process.

Nevertheless, the Government of Canada also believes that, in failing to provide for the fullest possible use of electronic data interchange in the procurement process, the draft Model Law in its present form, if enacted as domestic law, would constitute a step backwards technologically for many States. This will reduce its attractiveness as a legislative model for those States. Canada has expressed this view consistently during the sessions of the Working Group on the New International Economic Order and it has been reiterated in the written comments we have received during our wide consultations on the draft Model Law, as adopted by the Working group. In view of the fact that UNCITRAL is currently engaged in the preparation of the legal rules on Electronic Data Interchange (EDI), the restrictive approach in the draft Model Law is doubly unfortunate.

Based as well on our consultations, Canada also believes that there is some room for improvement of the draft Model Law and offers the following comments on the English language version of the document with the aim of making it more acceptable to States for enactment as domestic legislation.

Article 2(c) An example where the definition of "goods" may cause a problem is the acquisition of printing. In Canada, in many provinces it is considered a service, but in others it is considered a good. It is not clear whether some things might be considered to be a good or a service in various States. The Working Group expanded the definition to include electricity. The definition could be further modified to provide an option for specific inclusion by States of some things and specific exclusion of others. This would add transparency and could lessen the possibility of disputes.

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Article 2(e) The use of the expression "supplier or contractor" throughout the draft Model Law seems to be tautological because there does not appear to be any difference between a supplier and a contractor in this context. Both words refer to the same person. In fact, neither word is really appropriate in the prequalification or even in the tendering process because such persons have not yet become suppliers or contractors; they are applicants for prequalification or tenderers or bidders. The definition in article 2(e) attempts to circumvent the problem by including "any potential party". The document might be improved somewhat by referring throughout to a "supplier" and redefining that term to include, according to the context, the persons it is intended to cover.

Article 6(2)(d) Change the words "this State" at the end to "any State" because a failure to fulfil such obligations in another place may well be of concern to a State considering entering into contractual relations with someone who will perform work in the State. Admittedly, it may not be easy to obtain this information, but at least, the opportunity to use the information is there, if it is known.

Article 6(2)(e) After "years" add "or while a sentence is being served for the offence, whichever is the greater" so as to avoid the anomalous situation of qualifying a firm while its principal or principals are incarcerated for an offence referred to in the paragraph.

Article 6(6); also 7(8) Change the words "false or inaccurate" to "false, inaccurate or incomplete".

Article 6(7) The words "proposals or offers" after the word "tenders" in the penultimate line have somehow been deleted and should be reinserted.

Article 7(1) There is a structural problem with regard to the placement of articles 11 and 12, which will be explained later. This also affects article 7(1). To rectify, delete the words "the submission of tenders, proposals or offers" before the words "procurement proceedings" and replace with the words "engaging in".

Article 7(3) This provision imports article 19(1)(j) and would require the procuring entity to specify the place and deadline for the submission of tenders in the prequalification documents. The procuring entity may not always be in a position to provide this information at this stage. It is not apparent why this requirement is present. Therefore add paragraph (j) to the article 19 exceptions.

Article 7(4) It is not common practice by procurement entities to provide details of all clarifications to all parties during the prequalification process although this is done during the bidding process. As drafted, the provision precludes any discretion by the procurement entity and could result in unnecessary and possibly costly communication of information. Change the word "shall" at the beginning of the penultimate line to "may" so that the requirement is not mandatory.

Article 7(5) The decision is based on the criteria and on the information submitted by the applicant for prequalification. This is not correctly reflected in the last sentence, which should be amended to read, "In reaching that decision, the procuring entity shall use only those criteria that are set forth in the prequalification documents."

Article 7(8) See the comment on article 6(6), which also applies to this article. In any event, the words "and may disqualify...if it finds at any time... that the information submitted was false or inaccurate" overlap with and repeat the power in article 6(6) and are unnecessary and could be deleted.

Article 8 This article in effect gives national treatment to foreign firms, subject only to the procurement regulations or other provisions of law. There seems to be no cogent reason why a State would enter into agreements such as the GATT, the Canada-United States Free Trade Agreement or the North American Free Trade Agreement while at the same time giving generally free and open access to procurement to all foreign nationals. While recognizing that a reciprocity provision could be contained in regulations, it would be more transparent and therefore more certain if article 8 were recast and based on reciprocity by referring to participation by suppliers from States that have adopted the Model Law.

Article 9 (in general) This article addresses the form of communication and not the time at which any such communication is deemed to be effective and it is therefore not satisfactory as a notice provision. As drafted, the Model Law seems to address this issue only within the context of article 32(4). A general rule should be agreed on and inserted, eg. when the notice is dispatched, if sent by EDI or fax, when it is received, if sent by mail or it could be left open as an option for the enacting State.

Article 9 (1) As indicated at the outset, the draft Model Law does not adequately respond to the needs of States that utilize electronic data interchange extensively in the procurement process. There are a number of such provisions in the document. The authority in article 9(1) to use EDI is made subject to such provisions. In order to commend itself to States that use EDI, article 9(1) should be amended to provide an option to make such provisions subject to this article so that States that use EDI could continue to do so while others would be free to continue to use paper if they so wish.

Article 11 and 12 There is a structural drafting problem because these articles refer to tenders, proposals and offers in the context of records and of inducements, but those types of procurement have not been described or even referred to in previous articles. There is therefore no logical structural foundation for the references in these two articles. The draft could be improved by placing articles 11 and 12 after article 16.

Article 11(1) There are jurisdictions where a central procuring entity does the procuring on behalf of client departments, which prepare the records. To accommodate all situations, change "shall prepare" to "shall maintain".

Article 11(1)(k) For consistency with the rest of the document, this provision should refer to "grounds and circumstances", not just to "grounds".

Article 11(3) It is not the normal practice of some procurement entities to automatically produce all this information for inspection, but rather to discuss with a particular bidder, if he inquires on a debriefing, why his bid was deficient or otherwise unsuccessful. Also, the information can be produced upon a specific application under access to information legislation. It is suggested that the words "for inspection by" in the second line be deleted and replaced by the word "to" so that the article will provide for availability without indicating the mode.

Article 12 As worded at present, this article does not catch bribes, commissions or other inducements that are offered through an agent. To correct this omission, insert the expression "directly or indirectly" in the third line after the words "submitted it". Insert the words "State or the" before the words "procuring entity" in the fourth line so as to cover other persons in a position to exercise influence on the procurement process.

Article 17(b) The reference to the "low amount or value" is not entirely clear. The expression of the idea might be improved by referring instead to the "small quantity or low monetary value".

Article 18(2) The requirement to publish invitations to tender or to prequalify in a newspaper or trade publication or technical journal of wide international circulation could cause significant difficulties and expense for procurement entities in some States unless electronic means could be used instead. This is just one of the problems with article 9, as drafted at present.

Article 19(10(b) or (c) The place of delivery of the goods should be stated in the invitation to tender.

Article 25(5) The Working Group agreed to add the word "single" before the words "sealed envelope" (para. 125 of the Report) and this decision is not reflected in the draft. However, there is a more serious problem for some States in that, as drafted, this provision does not permit electronic tendering. See the comments on article 9 with respect to EDI.

Article 26(1) The phrase "in effect" is somewhat ambiguous and should be replaced by the more specific phrase "open for acceptance".

Article 26(3) As drafted, this provision is contrary to the law and contracting practices as found in Canada and some other common law jurisdictions, a point the Canadian delegation made at the Working Group when it suggested that this article should be deleted. The law in Canada is that absent other specific terms and conditions, a contract is brought into being automatically upon the submission of a tender in response to a tender call. Article 26(3), in its present form, would change this in a way that many procurement entities would likely find disruptive and confusing. It is therefore suggested that the article be modified to permit the solicitation documents to state when, if at all, a bidder can withdraw his tender without forfeiting his tender security.

Article 29(1)(b) This provision places too strong an onus on a procurement entity because it could subject it to a post mortem on whether or not an error was or was not apparent on the face of a tender. The provision should be changed to provide either that the procurement entity "may correct", instead of "shall correct" or else that the procurement entity "shall correct...errors that it may discover on the face of a tender".

Article 32(3) It is assumed that the purpose of the last sentence is to provide that a failure by the procuring entity to obtain the necessary approvals within the specified time will not automatically extend the period of effectiveness of the tender or the tender security although the bidder may wish to do so. As the provision is drafted, this is not entirely clear. The provision should be amended by inserting the word "automatically" before the word "extend" at the beginning of the third last line of the last sentence.

Article 38 to 43 These provisions on review are optional. Having regard to the fact that Canada has well-developed systems of administrative law, federally and provincially (both common and civil law), it is not likely that these provisions would be adopted as such by any Canadian jurisdiction. Therefore, it would not be appropriate for Canada to comment on them.

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UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/377
30 April 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Twenty-sixth session
Vienna, 5 - 23 July 1993

PROCUREMENT

Proposed amendments to the draft Model Law on Procurement

Note by the Secretariat

The present note sets forth a listing by the Secretariat of possible amendments to the draft Model Law on Procurement that the Commission might wish to consider during its review and adoption of the draft Model Law, in addition to any suggestions made by Governments in their comments as set forth in document A/CN.9/376 (and Add.1).

Title

It is suggested that the full title should read "UNCITRAL Model Law on Procurement". This would be in line with the titles of other model laws formulated by the Commission.

It may be helpful for a footnote to be added referring to the Guide to Enactment of the Model Law.

Article 2(g)

Consideration may be given to broadening the wording of the subparagraph so as to encompass two other functions of a tender security not presently mentioned. These other functions are: to cover withdrawal or modification of a tender after the deadline for submission of tender and to secure the obligation to supply a performance guarantee, if required to do so (see article 27(1)(f) of the Model Law, which lists those additional functions of a tender security). Instead of adding specific references to those additional functions, which might make the definition unwieldy, a more general wording might be substituted for the definition along the lines of "to secure fulfilment of certain obligations."

Articles 6(6) and 7(8)

It may be specified that disqualification should occur only in the case of "substantial" inaccuracy; disqualification for any inaccuracy may give too much scope for the procuring entity to disqualify for improper motives.

V.93-85101

Article 9(2)

The reference to article 11(3) should be replaced by a reference to article 18(3). Moreover, it may be questioned whether paragraph (2) should refer to article 32(1), since the latter provision concerns the notice of acceptance of a tender and therefore may have direct implications for the entry into force of the procurement contract. In that light, it may be preferable for such a communication only to be permitted in a form that provides a record of the communication.

Article 11(1)

Consideration might be given to adding to the required content of the record a summary of requests for clarifications and of the corresponding clarifications.

Article 11(3)

It is envisaged in the present text that a court could order disclosure of the information referred to in article 11(3)(f) and (g) at a point earlier than the termination of the procurement proceedings. However, those subparagraphs concern circumstances that could not arise until the end of the procurement proceedings. It is accordingly suggested to reformulate paragraph (3) as follows:

"... without resulting in a procurement contract, Disclosure of the portion of the record referred to in subparagraphs (c) to (e) may be ordered by a competent court. However, except when ... ."

In order to distinguish the information referred to in paragraph (3)(b) from the summary referred to in paragraph (1)(e), the following text may be added to paragraph (3)(b):

" ... and tender, proposal, offer or quotation prices, beyond the summary referred to in paragraph (1)(e)."

Article 14(1)(a)

In the chapeau, the expression "is unable to formulate detailed specifications" may be too restrictive since a procuring entity in a given case may be "able" to formulate specifications, but, nevertheless, for legitimate reasons, may seek proposals for solving its procurement need. The words "prefers not to formulate detailed specifications" might be more appropriate.

The Commission may wish to consider replacing the present text of subparagraph (ii) by a formulation along the following lines:

"because of the nature of the goods or construction, specifications cannot be established with sufficient precision to permit the award of the contract by selecting the successful tender according to the procedures set forth in chapter II."

Article 14(1)(c)

It may be considered that subparagraph (c) is unnecessary since article 1(2) permits the application of the Model Law to excluded sectors "to the extent that" the procuring entity may decide that it is appropriate.

Article 14(1)(d)

For the purposes of clarity and to avoid disputes as to the decision of the procuring entity on a matter that should be left to its judgment, it may be useful to replace the words "when engaging in new tendering proceedings" by the following: "when, in the judgment of the procuring entity, engaging in new tendering proceedings".

Article 16(f)

The same question may be raised as to the necessity of this provision as is raised above with respect to article 14(1)(c).

Article 16(g)

It may be noted that the approval requirement in subparagraph (g) is not presented as an option, unlike the references to approval at other points in the Model Law.

Article 17

The reference to article 11(2) should be replaced by a reference to article 18(2).

Article 19(1)(d)

The reference to article 8(1)(a) should be replaced by a reference to article (6)(2).

Article 19(2)

Paragraph (2) excludes the place and deadline for the submission of tenders from the information required to be set forth in the invitation to prequalify. However, article 7(3) requires that information to be provided in the prequalification documents. Since there would be cases in which the prequalification documents would be ready at the time of the issuance of the invitation to prequalify, article 19(2) may be modified to require the invitation to prequalify to indicate the place and deadline for submission of tenders, if known at that time.

Article 20

It would appear advisable to expand the application of the rule in the third and last sentence to the price that may be charged for prequalification documents. In that case the words "may charge for the solicitation documents" would be replaced by the words "may charge for the prequalification documents and the solicitation documents". The title of the article could then be modified to read as follows: "Provision of solicitation documents; price of prequalification documents and solicitation documents".

Article 21(f)

It may not be desirable to require that in all cases in which a contract is to be signed pursuant to article 32(2), the solicitation documents should contain the entire text of the contract to be signed, since there may be cases in which certain minor details may not be determined at the time of the issuance of the solicitation documents. The provision might rather refer to the principal terms and conditions of the procurement contract.

Article 21(g)

At present, the Model Law does not expressly require a procuring entity that solicits alternative tenders to disclose in the solicitation documents the manner in which the alternative tenders would be considered (e.g., whether a supplier or contractor submitting an alternative tender would also have to submit a tender in conformity with the specifications in order to have the alternative considered). The lack of an express rule on this point may be remedied by adding the following text at the end of subparagraph (g): "and a description of the manner in which alternative tenders are to be evaluated and compared."

Article 22

Consideration may be given to moving article 22 to chapter I, since the principle of objectivity in the description of the goods or construction in the solicitation documents would also have application in procurement proceedings involving methods other than tendering.

Article 22(3)(b)

It may be considered that this provision, if interpreted literally, would require the use of standardized trade terms and abrogate the right of the parties to vary those terms. A degree of flexibility may be added by replacing the words "Standardized trade terms shall be used" by the words "Due regard shall be had for the use of standardized trade terms".

Article 25(5)

Consideration may given to adding a requirement that tenders must be signed or authenticated in some other manner.

Article 26(2)(b)

It is suggested that the words "if it is not possible to do so" may be deleted since they suggest that a supplier or contractor agreeing to extend the tender validity period may only provide a new tender security if extension of the existing one were impossible. This would be an unintended effect since the supplier or contractor may have good reason for providing a new security and presumably could do so without negatively affecting the interests of the procuring entity.

Article 29(1)(b)

Consideration may be given to replacing the words "shall give notice" by the words "shall give prompt notice".

Article 29(4)(d)

The Commission may wish to consider adding an express requirement that use of a margin of preference should be reflected in the record. Such a requirement would also be reflected in article 11(1).

Article 29(5)

The following text may be added at the end of the paragraph in order to make it clear that the exchange rate used must be the one prescribed in the solicitation documents: " ... and comparing tenders according to the rate indicated in the solicitation documents in accordance with article 21(r)."

Article 32(3)

For a clearer statement of the role of the solicitation documents, the words "Where the procurement contract is required to be approved" may be replaced by the following: "Where the solicitation documents stipulate that the procurement contract is subject to approval".

Article 32(6)

In order to promote transparency in the procurement process, the disclosure requirement set forth in paragraph (6), which is currently limited to suppliers and contractors, could be extended to the general public. This might be accomplished by requiring publication of the notice of the procurement contract, as an obligation separate from the notice presently required to be given to suppliers and contractors.

Article 35(4)

In order to make clear the obligation of the procuring entity, the following text may be added at the end of paragraph (4): " ... of their proposals. The procuring entity shall select the successful offer on the basis of the best and final offers."

Article 36(1)

The following may be added at the end of paragraph (1) so as to further elucidate the precision with which the procuring entity should describe the components of the price quotation: " ... are to be included in the price and shall be informed about those charges, duties and taxes in the supplier's country that are to be excluded."

Article 38(2)(d)

The reference to article 28(1) should be replaced by a reference to article 30(1).

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